IN THE HIGH COURT OF JUDICATURE FOR AJASHTAN,
JAIPUR BENCH, JAIPUR.

S.B. Civil Misc. Appeal No. 910 / 2003

M/s Ferro Concrete Construction (India) Pvt. Ltd.

Versus

State of Rajasthan & Ano.

Date of Judgment: 30 May 2007

Hon'ble Mr. Justice R. S. Chauhan

Mr. Kishore Srivastava, Senior Advocate, with
Mr. Abhay Jain, for the Appellant
Mr. Bharat Vyas, Additional Advocate General, with
Mr. Samit Bishnoi for the Respondent State

(Per Court):

The dispute between the Appellant and the State had taken both the parties before a Sole Arbitrator. Vide Award dated 21-9-1994 the learned Sole Arbitrator passed an award in favor of the Appellant. Since the said award aggrieved the State, it filed objections against the award under Sections 30 and 33 of the Arbitration Act, 1940 ('the Act', for short) before the District Judge, Jaipur. Vide Order dated 17-2-2003, the learned Judge accepted the objection of the State with regard to Claim No. 37 A, but rejected all the other objections raised

by the State. Since the Order dated 17-2-2003 aggrieved both the parties, they challenged the same by filing two different appeals before this court. We have already decided the appeal filed by the State, namely S. B. Civil Misc. Appeal No. 872/2003. In the present appeal the Appellant is challenging the acceptance of the objection of the State with regard to Claim No. 37 A of the claim petition and the modification of the date from which the interest would be payable.

The brief facts of the case are that in order to ensure supply of water to various districts of Rajasthan, the State of Rajasthan decided to construct a dam on the Banas River in Tonk district. The project is known as the Bisalpur Water Supply Project. In order to further implement this project, the Public Health and Engineering Department (henceforth to be referred to as 'the Department', for short) invited tenders for providing and laying of PSCC Pipes complete with suitable jointing material, Specials, Valves and construction of Valve Chamber, Anchor Blocks, suitable crossing including testing and commissioning of pipeline etc. under the Reorganization of Water Supply Scheme, Ajmer, Kishangarh, Beawar, (Bisalpur Water Supply Project), Package PL 3-4-7. The work was to be done in four stages.

Since different bidders had quoted different conditions, they were all called for a common discussion. Thus, in order to compare the tenders, certain Common Terms of References (CTR, for short) were framed on 22-2-1988. For the purpose of this appeal, Clause No. 3 of the CTR is the most important. But, the same shall be discussed at the appropriate place. For now, suffice it to say that since the appellant submitted the lowest tender, the Department accepted their tender. The work Order was issued on 22-8-1988. According to the Work Order, the work was to commence on 22-8-1988 and was to be completed by 21-8-1990. Hence, the work was to be completed within a period of two years. However, instead of expediting the completion of the project, the Department failed to fulfill various terms of the contract: according to the Appellant, the Mobilization Advance was not given in the terms agreed upon, the drawings and designs were not supplied on time, the route plan and the survey was not carried out on time, amounts were deducted from the running bills, not sufficient water was given for running the factory etc. Because of the lapses on the part of the Department, disputes arose between the parties. Eventually, the disputes were referred to the learned Sole Arbitrator. While the Appellant filed their claim petition, the Department filed its

counter-claim.

According to the Appellant, Clause No. 3 of the CTR dealt with " the Mobilization Advance" as under:

> Mobilization Advance (For PSC pipes only):
>
> 10% of the contract value shall be given against Bank Guarantee as mobilization advance at a simple interest rate of 18%. Recovery of mobilization advance shall be effected from Ist Running Bill on pro-rata basis in a way that complete mobilization advance is recovered by the time 75 % work is complete. Interest shall also be recovered along with recovery of capital mobilization advance. The assets built by the contractor out of mobilization advance so made will be mortgaged to the department. In case work is left incomplete, liquidated damages will be imposed as per terms of the document and the assets built by the contractor for manufacturing pipe will become the property of the department. Such assets can be used by the department for the purpose of completing the remaining work.

Furthermore, according to the Appellant, the Department was to grant the mobilization advance in one lump sum as the amount was to be utilized for the construction of a factory for manufacturing the pipes required in the project. Since the said factory was to be mortgaged to the department, the title papers of the factory were left with the department. However, the papers were to be returned once the Appellants repaid the mobilization advance amount to the

Department.

However, as disputes arose between the parties, both the parties blamed each other for the disputes. The Appellant claimed that they could not complete the project because the Department had breached the contract; the department, on the other hand, claimed that the appellant had left the project incomplete. According to Claim No. 37-A filed by the Appellant, the factory was hypothecated to the Department. Therefore, the Appellant could not take the machinery out of the factory in order to begin the production somewhere else. Hence, the machinery was lying idle. Therefore, the Appellant claimed to be suffering losses due to idling of machinery, staff and labour. The Appellant pleaded that such idling of machinery, staff and labour was not in the interest of either of the party. It claimed a loss of Rs. 6370/- per day on account of idling of machinery, staff and labour and a further loss of Rs 12, 072/- per day on account of non-production in the factory.

On the other hand, the Department filed its counter-claim petition: under counter-claim No. 3, the Department claimed Rs. 79,

87, 846.38/- on account of recovery of mobilization advance from the Appellant as on 31-12-1992. The Department also claimed an interest of 18% on the said amount for all periods till final recovery of this balance. According to the Department, since the Appellant had left the project as incomplete, it was entitled to recover the mobilization advance as mentioned above.

The learned Sole Arbitrator, vide award dated 21-9-1994, held that as he had already granted the counter-claim No. 3 in favour of the Department and had directed the Appellant to repay the mobilization advance in full along with the interest, he directed the Department "to release the documents relating to mortgage as mentioned above within a period of 30 days from the date of this award, failing which the claimant will be entitled to an award of Rs. 12,072.00 per day from the date of this award till the date of release of mortgage. No award in favour of claimant for the period I entered upon reference to the date of publication of the award." The learned Sole Arbitrator also directed that the interest of 18% per annum would be payable from the date of the award, namely from 21-9-1994.

The Department filed its objections against the award, including this part of the award, before the learned Judge. According to the Department, the Appellant was not entitled to payment of Rs. 12,072/- per day from "the date of award", but only from the date the mobilization advance was repaid to the Department. Vide order dated 17-2-2003, the learned Judge has held that "within thirty days from the date of making the award the rule of the court, the department would pay the award amount to the Appellant after deducting the mobilization advance along with 18% interest and would also return the title papers of the factory to the Appellant. If the Department failed to do so, then the Appellant would be entitled to Rs. 12,072/- per day from the date of the order of the court." The learned Judge also modified the date from which the interest of 18% per annum was payable. According to the learned Judge, the interest was payable not from the date of the award, but from the date of order, namely from 17-2-2003. To this limited extent the award dated 21-9-1994 was modified. Since the Appellant is aggrieved by this modification, it has filed the present appeal before this court.

Mr. Kishore Srivastava, the Senior Advocate, has raised a

plethora of contentions before this court: firstly, while considering the objections against an award, there are three options before learned court: I) to modify the award under Section 15 of the Act of 1940, ii) to remit the award for reconsideration under Section 16 of the Act of 1940, and iii) to set aside the award under Section 30 of the Act of 1940. In the present case, the learned Judge has not exercised his powers under Sections 16 and 30 of the Act of 1940. Instead, he has exercised his power under Section 15 of the Act of 1940 and has modified the award dated 21-9-1994. However, the power to modify an award can be exercised only in the four circumstances enumerated in Section 15 of the Act. Thus, it is a limited power. But in the present case, none of these four conditions exists; therefore, the learned Judge has traveled ultra-vires his jurisdiction in modifying the award.

Secondly, the learned Sole Arbitrator had given cogent reasons for directing that the amount of Rs.12, 072/- per day should be paid from the date of award. Therefore, the learned Judge should not have interfered with the same. The scope of judicial review of arbitral award is a narrow one. Hence, the learned Judge has over-stepped his jurisdiction.

Thirdly, the learned Judge has over-looked the fact that the learned Sole Arbitrator had directed the payment of Rs. 12, 072/- per day to the Appellant only if the Department failed to return the title papers within thirty days from the date of the award. The Department could have escaped this liability by returning the papers within the stipulated period. But it failed to do so.

Fourthly, according to the award, the Department had to pay more compensation amount than the Appellant had to repay as the mobilization advance. Therefore, the Department could have adjusted the mobilization advance amount and paid the rest of the award amount to the Appellant. In such a manner, neither of the party would have been aggrieved. But, instead of being fair and just in its dealing, the Department has been dragging its feet. According to the counsel, the State or its instrumentality should be fair, just and reasonable in contractual matters as well.

Fifthly, if the award is treated like money decree, then the money has to be paid. On the pretext of filing the objections under

Section 30 of the Act, the Department cannot keep the amount especially when this court had not granted a stay order in favour of the Department. Thus, the Department was legally bound to adjust the amount of mobilization advance and to pay the remaining award amount to the Appellant.

Sixthly, the learned Judge has passed a self-contradictory order. According to the learned Judge, the Appellant is not entitled to Rs. 12, 072/- per day from the date of the award, as it has not repaid the mobilization advance. However, it would be entitled to such payment in case the papers are not returned within thirty days of the date of order and decree. However, even now, neither the award amount has been paid, nor the award amount has been adjusted with the mobilization advance, nor the papers have been returned within thirty days of the date of order and decree. Therefore, according to the learned counsel, on the basis of his own reasoning, the learned Judge should not have directed the payment of Rs. 12, 072/- per day to the Appellant in case the papers are not returned within thirty days from the date of order.

Seventhly, the learned Judge has adopted two different yardsticks while passing the impugned part of the order. On the one hand, the Appellant is directed to pay an interest of 18% on the mobilization advance from the date of award. Yet, on the other hand, the Department is directed not to pay the Rs. 12, 072/- per day from the date of award. But to pay the said amount in case the order is not implemented within thirty days from the date of the order and decree. In fact, the learned Judge should have adopted a single yardstick.

Lastly, the learned Judge has erred in modifying the date from which the interest of 18% per annum would be payable. Without assigning any reason, the learned Judge has held that the interest would be payable from the date of order, namely 17-2-2003. The learned Judge has, thus, deprived the Appellant of interest of almost nine years. According to the learned Counsel, the learned Sole Arbitrator is empowered to grant the interest of the pre-reference period, the pendentilite period and the post-award period. The learned Judge has not assigned any reason for changing the date from which the interest is payable. Thus, the order is a non-speaking one and is, hence, unsustainable.

On the other hand, Mr. Bharat Vyas, the learned Additional Advocate General, has vehemently argued that firstly, the learned Sole Arbitrator had unnecessarily confused the security created by the submissions of the documents of title with the recovery of the mobilization advance. While the security would continue to stay with the Department, the factory was with the Appellant. Thus, there is no question of any loss suffered by the Appellant. Secondly, according to Clause No. 3 of the CTR, the Department was justified in keeping the title papers within its custody till the mobilization advance was returned. Since the Appellant has not repaid the mobilization advance so far, the Department is entitled to keep the papers with it. Thirdly, as per Clause No. 3, the Department could give the factory to the any other party, which may be engaged to complete the project in case the Appellant were to fail in completing the project. Thus, he has supported the impugned order.

We have heard the learned counsels for the parties and have perused the award of the learned Sole Arbitrator and the impugned order.

The power to modify an award under Section 15 of the Act is a narrow one. Section 15 of the Act is as under:

> **Power of Court to modify award:-**
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> The Court may by order modify or correct an award—
>
> a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or
>
> b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or
>
> c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

It is, indeed, trite to state that once a power has been defined, it can be exercised only within the parameters of the provision of law and not outside it. Thus, the power of the court to modify the award is cribbed, cabined and confined by Section 15 of the Act. The said power can be exercised only in four circumstances: firstly where the award is upon a matter, which was not referred for arbitration; secondly, when it is imperfect in form; thirdly, when it contains a clerical mistake; or fourthly, it arises from an accidental slip or omission. However, in the first two circumstances, it is imperative that

the modification should not affect the decision of the learned Arbitrator. Hence, the power exercised by the learned Judge, in the present case, would have to be tested on the touchstone of Section 15 of the Act.

It is not in dispute that the differences had arisen between the parties about the return of the title papers and about the repayment of the mobilization advance; the said dispute were spelt out in claim No. 37-A of the Claim Petition and in counter-claim No. 3 of the Counter Claim Petition, respectively. The said disputes were, thus, referred to arbitration. Thus, the first circumstance envisaged by Section 15 of the Act is not fulfilled. Secondly, the decision of the learned Sole Arbitrator on claim No. 37-A and counter-claim No. 3 are inextricably intertwined. In fact, according to the learned Sole Arbitrator, he has directed the return of the papers solely on the ground that he has equally directed the Appellant to repay the mobilization advance to the Department. Hence, it is difficult to separate the decision from the other part of the award. Thirdly, the learned Sole Arbitrator had given cogent reasons for directing the Department for returning the papers within the stipulated period as a quid pro quo to the repayment of

mobilization advance. It was only if the Department failed to return the papers within the stipulated period that it was directed to pay Rs. 12, 072/- per day from the date of the award. The said decision has been modified by the impugned order to the extent of “affecting the decision on the matter referred”. Thus, the learned Judge has overlooked the three requirements of sub-section (a) of Section 15 of the Act.

Similarly, the award was neither imperfect in form, nor did it contain any obvious error which could be amended by the learned Judge. Thus, the requirement of sub-section (b) of Section 15 is absent in the present case.

Likewise, the award did not contain any clerical mistake or an error arising form an accidental slip or omission. Therefore, the requirement of sub-section (c) of Section 15 of the Act is equally missing. Since none of the requirements of Section 15 of the Act has been satisfied, the learned Judge has over-stepped his jurisdiction while modifying the award. Hence, the impugned order is unsustainable to the extent it has modified the award.

The contention of Mr. Vyas that the Department is justified in not returning the papers, as the mobilization advance has not been repaid is without substance. For, it is not in dispute that both according to the award and the impugned order it is the Department that has to pay a large amount to the Appellant. Meanwhile, the Appellant has to merely repay Rs. 79, 87, 846.38 to the Department. Thus, the amount of Rs. 79, 87, 846.38 could easily be adjusted in the award amount and the balance amount could be paid to the Appellant. However, the Department has been dragging the case so as to escape the liability of making the payment. Such a tactic cannot be allowed.

It is, indeed, a settled position of law that the action of the State should be fair, just and reasonable. This is true not only in administrative action, but also in financial dealing of or by the State. In matters of contract, the State cannot act like Shylock. It must be fair, just and reasonable with the other party to the contract. In the case of L.I.C. v Consumer Education and Research Centre and Ors. (1995) 5 SCC 482, the Hon'ble Supreme Court held as under:

> In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or

> obligation are enjoined in a manner that is fair, just and equitable, after taking objectively all the relevant options into consideration and a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision. Duty to act fairly in part of fair procedure envisaged under Articles 14 and 21. Every activity of the pubic authority or those under public duty or obligation must be informed by reason and guided by the public interest. It is the exercise of the public power or action hedged by public element that becomes open to challenge. If it is shown that the exercise of power is arbitrary, unjust and unfair, it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actins are in the field of private law and they are free to prescribe any conditions or limitations in their action as private citizens simpliciter do in the field of private law. Its actions must not be guided by irrational or irrelevant considerations. Every administrative decision must be hedged by reasons.

In the present case, the learned Sole Arbitrator had given his finding that the Department had committed the breach of contract. He, therefore, granted the award in favour of the Appellant. He also directed the Appellant to repay the mobilization advance to the Department and in turn directed the Department to return the papers. Subsequently, the learned Judge made the award a rule of the court. Although the Department had filed an appeal before this court, this court had not granted any interim order in favour of the Department

staying the operation of the award. Thus, during the pendency of the appeal, the award was in force. However, despite the award being in force, the Department did not implement the award and did not pay the award amount to the Appellant after adjusting the mobilization amount. Thus, it has not been fair, just and reasonable with the Appellant. Therefore, the stand of the State is most unjustified.

As far as date from which the interest is payable is concerned, after the pronouncement of the Constitutional Bench in the case of Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa & Ors v N. C. Budharaj (Deceased) by LRs & Ors, (2001) 2 SCC 721, the issue is no longer res integra. According to the Hon'ble Supreme Court, the Arbitrator is empowered to award interest for the pre-reference period, for the pendentilite period and for the post-award period in case there is no prohibition contained in the contract between the parties. Undisputedly, no such restriction about the payment of interest existed in the contract between the Appellant and the Department in the present case. Therefore, the learned Sole Arbitrator was within his power to grant an interest from the date of the award. Since the learned Sole Arbitrator had legally and validly

exercised his power in granting the interest from the date of the award to the Appellant, the learned Judge was not justified in interfering with the same. The learned Judge has ignored the settled position of law that the court does not exercise an appellate power over the arbitral award. Therefore, the scope of judicial interference in arbitral award is extremely limited. Hence, the learned Judge should not have modified the date from which the interest was payable.

Moreover, the learned Judge has not assigned any reason, much less a cogent reason, for changing the date from which the interest would be payable. When an order is subject to an appeal, it is imperative that the court assigns reasons. In absence of reasons, the order suffers from the virus of non-application of mind as the application of mind is conspicuously missing. Hence, the impugned order to the extent it has modified the date from which the interest is payable is unsustainable.

For the reasons stated above, this appeal is allowed and the amount awarded under Claim No. 37-A is restored in terms of the Award dated 21-9-1994 and the post-decreetal interest @ 18% per

annum from the date of award is granted in favour of the Appellant.

There shall be no order as to costs.

R. S. Chauhan J.